

State Personnel Board, State of Colorado

Case No. 97 B 173

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICK DAVISON,

Complainant,

v.

COLORADO DEPARTMENT OF TRANSPORTATION,

Respondent.

Hearing on this matter was commenced on August 8, 1997 before Administrative Law Judge G. Charles Robertson. An evidentiary hearing was held and completed before G. Charles Robertson, Administrative Law Judge, on December 4 - 5, 1997 at 1120 Lincoln Street, 14th Floor, Denver, CO.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, Respondent's actions are **UPHELD**

PRELIMINARY MATTERS

Respondent, Colorado Department of Transportation ("CDOT" or "Respondent") was represented by Steven A. Chavez, Assistant Attorney General. Complainant, Rick Davison ("Complainant") was represented by Patrick Zakis, Attorney at Law.

1. Transcription Device Failure

As a result of a transcription machine malfunction, the transcription record of the morning testimony of August 8, 1997 was lost. Upon consent of the parties, and as a result of the malfunction, the matter reconvened at approximately 1:00 p.m. on August 8, 1997. At that point, the hearing was recommenced and the testimony of the witnesses previously introduced was solicited for a second time. All parties consented to this procedure.

2. Witnesses

CDOT's witnesses included: (1) Celina Benevidez, Division Director of Human Resources for CDOT, Denver, CO, (2) Karen Bradshaw, Governor Advocate for CDOT, Denver, CO, (3) David Guy, Manager, Western Employees Assistance Services, Centura Health, Durango, CO, (4) Sherman Blood, Heavy Equipment Mechanic for CDOT, Durango, CO, (5) Paul Blocker, Auto Technician I for CDOT, Durango, CO, (6) Daniel Rymer, Heavy Equipment Shop Supervisor I for CDOT, Durango, CO, (7) Robert Herkenhoff, former Heavy Equipment Shop Supervisor for CDOT, Durango, CO, (8) Ted Vickers, former Maintenance Superintendent for CDOT, Durango, CO, and (9) Alice Baker, Equal Employment Opportunity Officer (Administrative Program Specialist III), CDOT, Durango, CO. On rebuttal, CDOT's witnesses included Dan Rymer, Heavy Equipment Shop Supervisor I.

Complainant's witnesses included: (1) Greg Offutt, Road Maintenance Employee M-1 for CDOT, (2) Jim Powell, Storeroom employee, for CDOT, Durango, CO, (3) Lonnie Taylor, Heavy Equipment Mechanic, for CDOT, Durango, CO, (4) Marcus Skaggs, Heavy Equipment Mechanic for CDOT, Durango, CO, (5) Bradley Roeder, Heavy Equipment Mechanic for CDOT, Durango, CO, (6) Louie Lucero, Heavy Equipment Mechanic for CDOT, Durango, CO, and (7) Complainant, Rick Davison.

3. Exhibits

CDOT's exhibits 1 - 20 were entered into evidence pursuant to stipulation by the parties. The exhibits included:

- 1) Grievance Form Completed by Rick Davison, dated April 6, 1996,
- 2) Grievance Form Completed by Rick Davison, dated March 16, 1997,
- 3) Correspondence to Rick Davison from A. A. Shablo, dated April 23, 1996,
- 4) Memorandum to Rick Davison from Bob Herkenhoff, dated April 29, 1996,
- 5) Memorandum to Rick Davison from Jon T. Vickers, dated May 6,

- 1996,
- 6) Correspondence to Rick Davison from A. A. Shablo, dated July 22, 1996,
 - 7) Memorandum to Alice Baker from Bob Herkenhoff and Dan Rymer, dated May 7, 1997,
 - 8) Correspondence to Steve Chavez, Assistant Attorney General from David L. Guy, dated May 9, 1997,
 - 9) Notes of Dan Rymer, dated August 1, 1996,
 - 10) Grievance - Step 1 Notes/Correspondence from David L. Guy, dated April 12, 1996,
 - 11) Correspondence to Dan Rymer from A. A. Shablo, dated July 22, 1996,
 - 12) Correspondence to Alice Baker from Bill Bever, C.A.P.E., dated May 21, 1996,
 - 13) Memorandum to A. A. Shablo from Alice Baker, dated August 8, 1996,
 - 14) Statement from Paul Blocker, dated May 13, 1997,
 - 15) Statement from Sherman Blood, dated May 12, 1997,
 - 16) Statement from Jeri Engler, dated May 7, 1997,
 - 17) Correspondence to Rick Davison from Celina Benevidez, dated June 16, 1997,
 - 18) CDOT Policy Directive: Workplace Violence, dated December 21, 1995,
 - 19) Documentation Letter to File from Bob Herkenhoff, dated August 8, 1996,
 - 20) Corrective Action to Rick Davison from Ted Vickers, dated August 20, 1996.

Respondent's Exhibit 21, entitled Performance Planning and Appraisal Form, dated January 1, 1996 was introduced and admitted during Respondent's case-in-chief.

Complainant's Exhibit A, PACE Form for Rick Davison, for July, 1994 through February 6, 1995, was stipulated into evidence. Complainant had CDOT's Exhibit 22 marked for identification but it was not offered into evidence.

3. Orders

A sequestration order which instructed witnesses not to discuss this matter, or their testimony, with other witnesses during the course of the hearing had been entered in the original morning session of August 8, 1997. The parties agreed during the course of subsequent testimony that the sequestration order was in place for the entire hearing. Complainant was present during the entire hearing and was specifically advised of the sequestration order.

On September 18, 1997, CDOT filed a Motion for Sanctions against Complainant. CDOT argued that Complainant violated the terms of the sequestration order by contacting one of CDOT's witnesses, Alice Baker ("Baker"), after she had testified. CDOT argued that Complainant telephoned Baker to discuss the case and her testimony. An affidavit of Baker was included with the Motion for Sanctions. CDOT requested sanctions be imposed, including barring Complainant from testifying in this matter. On September 23, 1997, Complainant filed a response to CDOT's Motion for Sanctions. Complainant argued that Baker had been dismissed from the case and that the conversation was innocent to the extent that her testimony was not criticized and that Complainant was merely thanking Baker for her participation in the hearing.

On September 18, 1997, the administrative law judge reserved ruling on the motion until the hearing reconvened and further advised counsel to re-advise its witnesses of the presence of the sequestration order. At hearing, the administrative law judge reserved ruling on the Motion for Sanctions until completion of the entry of the evidence.

At this time, CDOT's Motion for Sanctions is **DENIED**. It is clear that CDOT suffered no prejudice from Complainant's admitted actions. Complainant's action was an innocent and sincere expression of appreciation and nothing more.

4. Closing Statements

The parties stipulated to submitting their closing arguments in writing after having reviewed a transcript of the proceedings. As a result, the administrative law judge ordered that once the transcript was received by both parties, which was to be acknowledged by each party filing a Notice of Receipt of Transcript, the parties would have two weeks to submit closing arguments. In addition, it was stipulated that because there would be a delay in obtaining the transcript, in the event Complainant prevailed, back pay would stop accruing on December 31, 1997.

Both parties filed a Notice of Receipt of Transcript on January 7, 1998, indicating the transcripts were received by the parties on January 5, 1998. As a result, closing arguments were due January 20, 1998. CDOT filed its closing argument on January 20, 1998. Complainant filed a Request to Extend Filing Closing Brief on January 20, 1998, by fax, and by regular mail on January 21, 1998, requesting an extension of time to submit a closing argument. Complainant's request was denied for reasons recited in an order dated January 21, 1998. On January 22, 1998, Complainant filed a Closing Brief. CDOT proceeded to file a Motion To Strike the Complainant's Closing Brief to which Complainant filed a response. On January 31, 1998, the administrative law judge granted CDOT's Motion to Strike. The Closing Brief of Complainant was not entered as part of the record and not reviewed by the administrative law judge. The hearing was deemed concluded on January 31, 1998.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed, including violating CDOT's workplace violence policy and the failure to comply with standards of efficient service and willful misconduct.
2. Whether the discipline imposed, termination, was within the range of alternatives available to the appointing authority;
3. Whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule of law; and
4. Whether CDOT's decision to terminate Complainant's employment was in retaliation for any formal or informal complaints lodged with CDOT's management by Complainant.

FINDINGS OF FACT

1. CDOT has various shops located in regions throughout the state of Colorado in which state employees are responsible for fulfilling CDOT's responsibilities. One such shop is located in Durango, Colorado (the "Durango Shop").
2. CDOT's Workplace Violence Policy, Policy No. 10, effective December 21, 1995 provides, in part:

It is the policy of the CDOT to maintain a work environment free from **intimidation, threats, or violent acts**. The CDOT will not tolerate **any behavior or threat of violent behavior directed at a co-worker, supervisor**, subordinate, client, state property, or facilities. This includes, but is not limited to, **intimidating, threatening, or hostile behaviors**, physical abuse, vandalism, arson, sabotage, use of dangerous or illegal weapons, . . . **offensive comments regarding violent events**, or any other act, which, in management's opinion, is inappropriate to the workplace. Such behaviors may result in corrective and/or disciplinary action, and potentially criminal charges.

3. The policy further defines "**violent behavior**" as "any act or threat of physical, verbal or psychological aggression, or the destruction or abuse of property by an individual." "**Threat Situations**" is defined as "any act by an employee, supervisor, or external party which unnecessarily creates an unsafe or unhealthy work environment . . . [t]hreats include **veiled, conditional or direct verbal** or written threats intended to **intimidate**,

harass, harm, or endanger the safety of another person or property.”

4. Western Employees Assistance Services (“WEAS”) provides psychological support services including work site interventions, consultations, and supervisory trainings. In the past, CDOT retained the services of WEAS.
5. Prior to the termination of Complainant’s employment, CDOT management recognized that the Durango Shop was in need of training to address issues within the Durango Shop, including employee conflict resolution. Such is demonstrated by the following:
 - a) Correspondence from a WEAS employee indicating that WEAS had been retained by CDOT for services in the Fall, 1995. WEAS was to provide information to the Durango Shop on Conflict Management, Inter-personal skills and Human Relations Team Building. Employees did not have to pay for the services.
 - b) Mediation services were provided by B. Collins on behalf of CDOT to help resolve, in general, conflicts within the workplace.
 - c) Mediation services were provided by C. Ecker in response to a grievance filed by Dan Rymer, Shop Supervisor. This grievance was filed as a result of A. A. Chableau, Regional Transportation Director for District 5 (including the Durango Shop), having conducted a number of mediation sessions with the Durango Shop in order to resolve unspecified issues.
2. The history of the Durango Shop demonstrates that there were a number of employee conflict issues which needed to be resolved at the location.
3. CDOT maintains a public information office in Denver, Colorado. Karen Bradshaw is a governor advocate in that office. Her responsibilities include monitoring and resolving complaints and letters addressed to CDOT. In so doing, she writes written reports to document types of incidents, complaints, etc.
4. CDOT employs an Equal Employment Opportunities Officer , Alice Baker, who conducts internal and external equal employment opportunity investigations, involving discrimination, grievances, and complaints associated with CDOT and its employees.
5. Complainant, Rick Davison, at the time of his termination, was certified in his position as a Welder at the Durango Shop. Previously, Complainant was a highway maintenance worker for CDOT near Glenwood Springs, CO. Complainant began his employment with CDOT in June, 1991.
6. At the time of Complainant’s termination of employment, June 17, 1997, Complainant

was supervised by Bob Herkenhoff (“Herkenhoff”). Herkenhoff reported to Ted Vickers (“Vickers”). In addition, Complainant was required to take direction, in the course of performing his duties, from Dan Rymer, Shop Supervisor (“Rymer”).

I. Complainant’s Employment History at the Durango Shop and the Durango Shop Environment

11. On May 31, 1995, prior to transferring to the Durango Shop, Complainant reviewed and signed a Performance Planning and Appraisal Form (“1995 PACE”) for the period of July 1994 to February 1995. His overall rating at that time was Good. In the area of Communications he was rated Good. In the area of Interpersonal Relations he was rated as Good. No narrative comments were made in this evaluation.
12. Complainant obtained his position in the Durango Shop through an application and interview process in or around December 1995. Applicants for the Welder position included Dan Rymer, the Shop Supervisor for the Durango Shop. However, Complainant was selected for the position. At the time of his selection for the Welder position, Complainant expressed concerns to Herkenhoff about having to work with Rymer in the Durango Shop as a result of Rymer having also applied for the Welder position. Rymer had filed a grievance with Vickers, protesting the hiring of Complainant.
13. As a result of having been selected for the Welder position, Complainant was forced to immediately relocate to the Durango area. In order to do so, Complainant initially lived in a motel, and subsequently lived in his motor home. CDOT refused to reimburse Complainant for expenses incurred in remaining in a motel for more than nine days.
14. On Complainant’s first day at the Durango Shop, an incident occurred with Rymer. Rymer informed Complainant that he was not permitted to use his own welding gear while working at the Durango Shop. This incident immediately created tension between Complainant and Rymer.
15. After working at the Durango Shop for approximately two weeks, Complainant hoped to enroll in a welding inspection certification course. He provided documentation to Rymer expressing his interest in completing the course. Rymer never submitted the documentation to Complainant’s supervisor Herkenhoff.
16. In the spring of 1996, Rymer requested Complainant to construct a high pressure tank for use on one of the CDOT highway maintenance vehicles. Construction of such a tank, as requested by Rymer, was prohibited. Complainant refused to build the tank. Rymer commissioned that the tank be built by an outside vendor. Complainant spoke with the outside vendor. In so doing, Complainant was argumentative with the vendor. Rymer filed a complaint with Herkenhoff against Complainant stating that Complainant was

insubordinate.

17. Complainant grieved the complaint, complained of hostile work environment, and requested specific welding publications. As a result, based upon a Step 4 Grievance decision rendered by A. A. Shablo on July 22, 1996, the insubordination charges were removed from Complainant's file and Rymer received a corrective action for ordering that the tank be built. In addition, the Step 4 Grievance decision addressed the issue of hostile work environment and indicated that mediation would occur in the Durango Shop and that all employees would have to participate. The Step 4 Grievance decision further ratified the Step 3 Grievance decision that the Durango Shop would purchase a portion of the requested welding publications for Complainant. Despite this resolution of the grievance, Complainant petitioned the Board for a hearing. The Board denied the petition for hearing on August 28, 1997.
18. In May, 1996, Complainant's son was tragically killed in an auto accident. At the time of the death, Complainant was residing in his mobile home in the Durango area. As a result, he did not have a personal telephone. The Durango Shop received a telephone call from Complainant's wife at the close of business on the day Complainant's son was killed. Staff from the Durango Shop failed to convey the message to Complainant. Complainant did not receive word of his son's death until approximately 10 hours after his wife had called the Durango Shop. No one from the Durango Shop took any affirmative action to attempt to locate Complainant after the close of business.
19. Subsequently, Complainant took leave to attend to family matters. It took over six months for Complainant's leave to be correctly allocated as funeral leave. In addition, at this time, Complainant had received reprimands about using the Durango Shop pay telephone. Complainant had been using the telephone during the course of the family crisis. In addition, Complainant had received reprimands about visitors to the Durango Shop. These reprimands were precipitated by the visit of Complainant's minister visiting Complainant during the family crisis.
20. In March 1997, Complainant filed a grievance with his supervisors, based in part on the fact that Rymer had been allowed to attend the welder inspection course which he had initially wanted to attend. In response to this grievance, Vickers indicated that Complainant could submit a request to attend the course and would be allowed to attend the course pending available funds.
21. Brad Roeder, a heavy equipment mechanic, was disciplined as the result of engaging in workplace violence at or near the same time discipline was imposed upon Complainant. Roeder was determined to have violated the workplace violence policy, and was reassigned to a field mechanic position outside of the physical location of the Durango Shop. The workplace violence which Roeder engaged in included aggressive verbal

behavior and a physical assault on a co-worker.

II. Complainant's Behavior in the Durango Shop

22. In an attempt to resolve the grievance which Complainant had lodged against Rymer in the Spring of 1996, Complainant and Rymer met with WEAS' David Guy. At that session, Complainant was belligerent, had angry outbursts, was aggressive and would not participate in attempting to resolve the grievance through the use of WEAS staff.
23. In a meeting with Baker and Vickers called by Vickers to address the complaint of insubordination in the Spring of 1996, Complainant refused to participate in the meeting when Rymer was invited to participate. In so refusing, Baker and Vickers witnessed Complainant getting very agitated, pushing back his chair from the meeting table, slamming his hand(s) on the meeting table, and stating that if Rymer was to participate, he would not.
24. In the course of the mediation sessions provided to the Durango Shop by A. A. Chableau, to address the issues of hostile working environment, Complainant commented to a co-worker that he understood why employees might bring an Uzi to the workplace and why there is the postal worker syndrome.¹
25. On December 30, 1996, Complainant reviewed and signed a Performance Planning and Appraisal Form (" 1996 PACE") for that calendar year. The overall rating for the period was Good. In the area of Communications, his rating was between Needs Improvement and Good. Complainant was rated similarly in the area of Interpersonal Relations. On page 1 of the 1996 PACE, under areas for development, it was noted that Complainant "needs to learn to control his temper so that he can communicate effectively." In the performance appraisal narrative portion of the 1996 PACE, Complainant agreed he needed to work on the area of communication but further stated that there were communication problems throughout the Durango Shop.
26. On May 1, 1997, Complainant and the staff of the Durango Shop participated in a morning briefing. As was customary, the staff had gathered in a large circle on the Durango Shop floor in order to review any relevant issues for the day. Witnesses present at the morning briefing included Paul Blocker, Dan Rymer, Bob Herkenhoff, Lonnie Taylor, Sherman Blood, Marcus Skaggs, Bradley Roeder, and Louie Lucero.

¹ An Uzi is an automatic/semi-automatic firearm capable of rapidly firing repeated rounds of ammunition. Postal Worker Syndrome is a slang term used to describe incidents of violence which have occurred at various U.S. Postal Centers during the last decade. Such incidents have included previous postal workers committing acts of workplace violence, including murder, against postal personnel and former supervisors.

27. As this meeting Herkenhoff instructed the staff that no radios would be allowed in the Durango Shop and that the rules against smoking were to be more strongly enforced. This instruction was the result of a complaint filed by Complainant.
28. At the time of this announcement, Complainant stated that it was not his goal to have radios banned from the Durango Shop when he lodged his complaint. Rather, he just wanted the volume reduced. At the same time, Sherman Blood ("Blood"), who often played a loud radio, stated directly to Complainant that he had wished Complainant had raised his concerns directly with him instead of filing a complaint with the supervisors.
29. Blood and Complainant then engaged in an argument. The two individuals moved a few feet towards each other until they were arms length apart. Both individuals elevated their voices. Complainant clenched his fists and his face turned red. Complainant argued that there were policies regarding the use of radios and that they had to be followed. Blood argued back that it would have been more appropriate not to involve the supervisors in trying to resolve the problem and that Davison was a troublemaker.
30. As the discussion became more heated, Blood and Davison ended up walking away from the confrontation. Both Blood and Davison went to their respective work areas.
31. The following day, Rymer and Herkenhoff solicited written comments from witnesses with regard to the incident between Blood and Complainant. Within the following two weeks, comments were provided by Paul Blocker, Jeri Engler, and Sherman Blood. The comments addressed the incident between Blood and Complainant, as well as the incident involving Brad Roeder referenced above.
32. On May 4, 1997, Complainant made a statement to Karen Bradshaw ("Bradshaw"), Governor Advocate for CDOT. While calling to complain about the hostile working environment at the Durango Shop, Complainant stated that its no wonder employees go postal and bring an Uzi to work.²
33. On May 29, 1997, an R8-3-3 meeting was held by Benevidez with regard to the May 1, 1997 incident. Complainant was represented by counsel during the meeting. During the course of the meeting, Complainant was given an opportunity to respond to the May 1, 1997 incident.
34. During the course of the meeting, individuals interrupted on behalf of Complainant. Benevidez indicated that they could submit their comment in writing but that she would

² Complainant reaffirmed this statement in a subsequent conversation with Bradshaw on June 18, 1997.

not solicit their comments during the meeting. Benevidez had also advised Complainant and counsel that she would be at the Durango Shop for at least one more day and would be available to receive additional information.

35. The delegated appointing authority conducted an investigation which included, but was not limited to:
- a) traveling to the Durango Shop and remaining at the Durango Shop for a few day in order to collect information subsequent to the R8-3-3 meeting,
 - b) interviewing Complainant's supervisor,
 - c) interviewing the Region EEO officer,
 - d) reviewing Complainant's personnel file,
 - e) receiving statements from individuals who had witnessed the May 1, 1997 incident,
 - f) correspondence from Complainant's supervisor to the Region EEO officer, and
 - g) reviewing a memorandum from the WEAS staff.
36. On June 16, 1997, Complainant was terminated from his employment with CDOT as a result of being in violation of the Workplace Violence Policy #10.0 as demonstrated by his actions (1) on May 1, 1997; (2) by his statements to Bradshaw with regard to postal worker syndrome; and (3) the hostile and threatening manner of his past behavior. Such a violation of policy constituted the failure to comply with standards of efficient service and willful misconduct.

DISCUSSION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held

that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

Respondent argues that Complainant has engaged in workplace violence and that his conduct represents a pattern of terror in the workplace. Respondent maintains that Complainant's behavior represents violations of CDOT's workplace violence policy. As a result, Respondent maintains that Complainant violated Board Rule R8-3-3 by failing to comply with standards of efficient service or competence and willful misconduct. Respondent further argues that Complainant's conduct is so egregious and ongoing that the only disciplinary action which could be taken by the appointing authority was the termination of Complainant.

Complainant argues that his behavior is not in violation of CDOT policy. Rather, that the incidents which have lead to this hearing have been manufactured by CDOT. Complainant maintains that as a result of Complainant's grievances in the past, CDOT is retaliating in an arbitrary and capricious manner by terminating Complainant. Further, Complainant argues that because the atmosphere at the Durango Shop was already hostile, that any incidents involving Complainant are being exaggerated. Complainant maintains that the investigation conducted by the appointing authority was inadequate in that individuals in support of Complainant were ignored. And, finally, Complainant maintains that even if Complainant had violated the workplace violence policy, the sanction of termination was excessive.

I.

Failure to Comply with Standards of Efficient Service or Competence, Willful Misconduct and Retaliation

A preponderance of evidence supports the conclusion that Complainant failed to meet the standards of efficient service or competence, and engaged in willful misconduct, thereby supporting Respondent's disciplinary action. CDOT's policy on workplace violence provides that CDOT will not tolerate any behavior or threat of violent behavior which is directed at a co-worker or supervisor. The policy provides that violent behavior includes any act or threat of physical, verbal, or psychological aggression. In addition, threats are defined to include offensive comments regarding violent events.

During Complainant's history of employment with CDOT at the Durango Shop, the evidence demonstrates that there were significant problems with the employees and supervision at the Durango Shop. Complainant was hired into a shop in which one of the individuals which would provide him work direction, Rymer, had competed for Complainant's job. It would be naïve to think the potential for friction between Complainant and Rymer did not exist. It is also clear that the friction often surfaced. Complainant was denied sufficient amount of time to relocate to his new Welder position at the Durango Shop and he was prevented from being able to reside in a motel for any period of time despite the expedited relocation. On Complainant's first day of work, he and Rymer had a conflict with regard to the use of personal welding equipment at the Durango Shop. Complainant was not sent to the welder certification course, but Rymer was able to attend the course. Complainant was initially disciplined for not building a high pressure tank pursuant to Rymer's instruction. With the death of Complainant's son came another onslaught of conflicts between Complainant and the Durango staff supervisors including debates about telephone usage, leave, and visitors. Clearly, issues existed as to the working environment at the Durango Shop.

However, in each of the outlined events, resolutions were eventually reached. Complainant's grievances were resolved to the extent that he was able to apply for the welding certificate course, any claims of insubordination for failing to build a high pressure tank were removed from his personnel file, his issues with regard to funeral leave were corrected and written materials on the subject of welding were provided at this workplace.

Despite such resolutions, Complainant exhibited behavior which comports with the definition of workplace violence as defined in CDOT's policy. On more than two occasions, Complainant stated words to the effect that he could understand why someone might use an Uzi and have postal worker syndrome. Those occasions have been documented and occurred over a period of time. Such statements, given the context, equate to offensive comments regarding violent events and constitute violent behavior as defined by the policy. The statements were

made to individuals outside of the Durango Shop and to co-workers and superiors in the Durango Shop. To ignore the fact that such statements were made is to condone threats and violent acts in the workplace.

Complainant has also demonstrated acts of physical aggression which exemplify hostile behavior. Complainant has stormed out of meetings with his supervisors, and physically struck objects so as to display his anger. In addition, in the course of discussing the implementation of Durango Shop policies on radios and smoking, Complainant became visibly angry, agitated, and approached his co-workers with closed fists.

Complainant seemingly makes two arguments to explain his behavior. First, Complainant maintains that the grounds for his termination are manufactured in retaliation for Complainant attempting to have CDOT policies enforced (i.e., building of high pressure tank, radio usage). However, testimony was proffered by individuals outside CDOT's Durango Shop which support Respondent's conclusions of a violation of the workplace violence policy. The testimony of Bradshaw and Guy clearly shows that individuals outside of the Durango Shop reached the same conclusions as Benevidez. The evidence proffered by Complainant to show that the working environment was hostile ever since his arrival at the Durango Shop is less credible. Two of Complainant's witnesses who testified in support of Complainant's retaliation argument had been disciplined for workplace violence themselves. Their interpretation of what constitutes workplace violence can only be viewed with skepticism. Second, Complainant seems to suggest that the atmosphere at the Durango Shop was so hostile that it justified his angry outbursts. Any such argument is flawed. Despite the atmosphere at the Durango Shop, and despite any acts which initially lead to Complainant's grievances, such does not excuse Complainant's own violent behavior. This is reinforced by the fact that many of Complainant's grievances or conflict issues were eventually resolved. Yet, his comments to Bradshaw occurred after the issues were addressed.

Compounding Complainant's violent behavior is Complainant's inability to participate in meaningful conflict resolution. His behavior during the course of mediation with WEAS suggests that mediating his conflict issues is ineffective. The fact that Complainant became agitated and refused to discuss the hostile work environment and Rymer with Vickers and Baker demonstrates that Complainant does not engage in productive conflict resolution. And, making comments regarding the use of an automatic weapon during the course of conflict resolution training highlights Complainant's inability to constructively participate in such sessions. CDOT had taken steps to improve the working environment at the Durango Shop. Mediation and conflict resolution training was occurring and tools were provided to the employees to help fix the Durango Shop. Complainant would or could not avail himself of those tools.

II.

Discipline Imposed within the Range of Alternatives

The discipline imposed by CDOT was within the range of alternatives for discipline. The Workplace Violence Policy, Policy 10 specifically states that corrective or disciplinary action can be imposed for violations of the policy. In terms of discipline, anything short of termination of employment would not have been constructive. Complainant's own behavior demonstrates that the use of mediation and counseling fails to correct his violent behavior.

Complainant argues that other employees had been disciplined for workplace violence but that such discipline did not include termination. Rather, the discipline imposed on those employees amounted to suspension or transfer. Respondent maintains that as a result of Complainant's violent behavior over a period of time, as opposed to a one time incident, anything less than termination would be ineffective. In this instance, a pattern of behavior has been observed. The facts support Respondent's conclusion.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed by violating CDOT's Workplace Violence Policy, Policy No. 10 and thereby (1) failing to comply with standards of efficient service or competence, and (2) engaging in willful misconduct.
2. The discipline imposed was within the range of alternatives available to the appointing authority.
3. A preponderance of the evidence supports the actions of the appointing authority and such actions were not arbitrary, capricious, or contrary to rule of law. While issues may have existed regarding the working environment at the Durango Shop during the course of Complainant's employment, such issues cannot be viewed as having been condoned by Respondent in order to retaliate against Complainant.
4. Neither party is entitled to an award of attorney fees or costs in this matter pursuant to section 24-50-125.5, C.R.S.

ORDER

Respondent's action is **UPHELD**. Complainant's appeal is dismissed with prejudice.

Dated this _____th day
of March, 1998
at Denver, Colorado

G. Charles Robertson
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double

spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____ day of March, 1998, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Patrick Zakis, Esq.
6000 East Evans Avenue, Suite 1-110
Denver, CO 80222

and in the interagency mail, addressed as follows:

Steven A. Chavez
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
